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No. 87-1795

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAINBOW TOURS, INC., D/B/A RAINBOW COACHES,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined the backpay due employees whom petitioner had discharged unlawfully.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 835 F.2d 1436 (Table). The supplemental decision and order of the National Labor Relations Board (Pet. App. 34-37), together with the findings and recommendations of the administrative law judge (Pet. App. 38-363), are reported at 280 N.L.R.B. No. 17. The Board's decision and order in the underlying unfair labor practice proceeding (Pet. App. 364-454) are reported at 241 N.L.R.B. 589; the court of appeals enforced that order in an unpublished decision reported at 628 F.2d 1357 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 456-478) was entered on February 18, 1988, following the

court's earlier denial of a petition for rehearing and suggestion for rehearing en banc on February 2, 1988 (Pet. App. 479-480). The petition for a writ of certiorari was filed on April 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioner, Rainbow Tours, Inc., operates a tour bus service in Honolulu, Hawaii. On January 29, 1977, members of the Teamsters union[1] began picketing outside petitioner's yard (Pet. App. 389). A group of petitioner's bus drivers decided to respect the Teamsters' picket line (*id.* at 400). Petitioner told these employees that they would be fired if they did not return to work. Petitioner also told the employees that, if they returned to work, they would "go to the bottom of the seniority roster" (*id.* at 403).[2] The striking employees refused petitioner's offer and on January 31 petitioner discharged 12 of its bus drivers (*id.* at 404). Several days later the drivers applied for reinstatement. Petitioner told them that "there were no full-time openings, but [petitioner] would accept their applications for part-time employment as and when needed" (*id.* at 406). Petitioner eventually rehired a number of the striking employees (*id.* at 406-414).[3]

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[1] The pickets belonged to the Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pet. App. 372).

[2] Petitioner further informed the employees that, should they seek union representation, any union other than the Teamsters would be acceptable (Pet. App. 404).

[3] Petitioner did not rehire eight of the striking employees. Two of the employees for whom backpay is at issue, Fonseca and Louis, were ultimately reinstated to positions not substantially equivalent to those they previously filled. Pet. App. 191-193, 200, 293.

The Board, upholding the decision of the administrative law judge (ALJ), concluded that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging the 12 employees for refusing to cross the picket line. The Board found that petitioner had not made a valid reinstatement offer to the employees on either January 31 or February 2. The Board thus ordered petitioner to offer the employees reinstatement with backpay. Pet. App. 418 & n.38, 431-433, 443.

The court of appeals enforced the Board's order without opinion (Pet. App. 455).

2. On September 30, 1982, the Board's General Counsel issued a backpay specification alleging that 10 of the 12 discriminatees were entitled to backpay in amounts totalling approximately $148,000 plus interest (Pet. App. 2, 24). The specification set forth, for each discriminatee, the gross amount of backpay alleged to be due for each calendar quarter in the backpay period,[4] the interim earnings that the discriminatee had received in each quarter, and the net backpay claimed for each quarter (the difference between the gross backpay and the interim earnings for the quarter). Petitioner filed an answer that denied most of the allegations in the backpay specification and raised several affirmative defenses. The General Counsel filed a motion for partial summary judgment, which the Board granted in part and denied in part. The Board remanded the case for a hearing. *Id.* at 23-33.[5]

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[4] The backpay period began on February 1, 1977, the day after the unlawful discharges, and ended in October 1980, when petitioner made valid offers of reinstatement to the discriminatees.

[5] The Board granted summary judgment with respect to the gross backpay of four discriminatees (Pet. App. 31). Petitioner does not challenge this ruling.

In preparation for the hearing, petitioner subpoenaed several banks for the records of any accounts held by the discriminatees. Some of the banks produced such records. Pet. App. 85-86. Petitioner also subpoenaed the Unemployment Insurance Office of the Hawaii Department of Labor and Industrial Relations (Department) for records relating to the discriminatees. The Department, invoking a state statute,[6] refused to produce any records. *Id.* at 75-76.

The ALJ held a lengthy hearing, during which petitioner presented witnesses and questioned each discriminatee about interim earnings and other relevant issues. At the outset, the ALJ, upon the Department's petition, revoked petitioner's subpoena on the ground that the state statute prohibited disclosure and petitioner had "failed to state with specificity any reason that the [Department's] claim of confidentiality and privilege should not be honored under the circumstances of this case" (Pet. App. 80). The ALJ, early in the hearing, also refused to order the banks to comply with the subpoenas until petitioner established "the relevance and materiality of the subpoenaed records" (*id.* at 88).[7] Petitioner initially failed to make such a show-

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[6] Haw. Rev. Stat. § 383-95(a) (1985) provides in pertinent part:

> [I]nformation obtained from any employing unit or individual pursuant to the administration of this chapter and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity.

[7] Certain banks had refused to comply with petitioner's subpoenas unless the banks received a "certificate of compliance" under 12 U.S.C. 3308. The General Counsel refused to sign the certificate, as required by statute, in part because "there was no reasonable cause to believe the records were sought for law enforcement purposes" (Pet. App. 87).

ing. Despite the ALJ's expressed willingness to reconsider her ruling, petitioner during the hearing "failed to describe with specificity those accounts in banks which failed to comply with the subpoena in a manner which would permit a finding of potential relevance" (*id.* at 94).

The ALJ made extensive factual findings with respect to each discriminatee, concluding that the backpay of four discriminatees should be reduced because they were unavailable for work or incurred willful losses of earnings during portions of the backpay period (Pet. App. 164-331). She further found that none of the discriminatees had willfully concealed interim earnings from the Board (*id.* at 139-148). Although calling "reprehensible" one discriminatee's failure to report earnings on his income tax returns, the ALJ concluded that this was "not the type of concealment that would toll backpay" (*id.* at 210). The ALJ recommended that the Board order petitioner to pay the discriminatees specified amounts totaling over $90,000 plus interest (*id.* at 333, 345-363).

The Board affirmed the ALJ's rulings, findings, and conclusions and adopted her recommended order (Pet. App. 34-37).

3. The court of appeals affirmed the Board's decision and enforced its order with a modification as to one discriminatee (Pet. App. 1-22).[8] The court concluded that the ALJ had not abused her discretion in denying petitioner's request for pretrial discovery where petitioner "failed to specify the information it sought * * * or the prejudicial effect of being denied discovery" (*id.* at 8). The

[8] The Board conceded in the court of appeals that the backpay award of one discriminatee should be reduced by approximately $1,300. The Court modified the Board's order accordingly (Pet. App. 22, 472-473). Petitioner does challenge this modification.

court further concluded that the ALJ had properly refused to enforce the bank subpoenas where petitioner failed to "establish relevancy" and had not shown an inability to "obtain [the subpoenaed] records by other means" (*id.* at 12). Similarly, the court held that the ALJ had properly revoked the subpoena to the Department on the basis of the state statutory privilege and concluded that petitioner's claim of prejudice was "unsubstantiated" (*id.* at 11).[9]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 13-18) that the Board's denial of its request for pretrial depositions and the Board's refusal to enforce its subpoenas amounted to a violation of the Due Process Clause. This contention is meritless. The Board's rules and regulations provide for pretrial depositions only upon a showing of good cause. 29 C.F.R. 102.30; see *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). Petitioner, however, never made such a showing. The court of appeals thus correctly concluded that the Board had not abused its discretion in denying petitioner's request because petitioner "failed to specify the information it sought through discovery or the prejudicial effect of being denied discovery" (Pet. App. 8).

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[9] The court did not address petitioner's argument that "backpay must be tolled by its offer of employment with reduced seniority since the offer constitutes substantially equivalent employment" because there was no "finding that [petitioner] offered to reinstate discriminatees to substantially equivalent positions" (Pet. App. 18-19).

The Board's rules and regulations also provide that a subpoena may be revoked on the ground that the information sought is irrelevant or "for any other reason sufficient in law" (29 C.F.R. 102.31(b)). With respect to the bank subpoenas, petitioner failed to provide a "description of the accounts or a showing as to [their] nature" and thus never established the relevance of the subpoenaed bank records (Pet. App. 11).[10] With respect to the subpoena issued to the Hawaii Unemployment Insurance Office, the Board exercised its sound discretion to respect the state policy of maintaining the confidentiality of employment-related information disclosed to the state agency. See, *e.g.*, *Canova* v. *NLRB*, 708 F.2d 1498, 1502-1503 (9th Cir. 1983); *Herman Bros. Pet Supply* v. *NLRB*, 360 F.2d 176, 178-180 (6th Cir. 1966).[11] Accordingly, the Board correctly refused to enforce these subpoenas.

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[10] Petitioner may not claim any prejudice from the Board's refusal to enforce the bank subpoenas because, as the court of appeals noted, petitioner could have obtained the information sought by enforcing the subpoenas served on the discriminatees themselves. See Pet. App. 12-13.

Petitioner's contention (Pet. 16) that the decision below conflicts with *General Engineering, Inc.* v. *NLRB*, 341 F.2d 367 (9th Cir. 1965), is wrong. The latter decision explicitly recognized that the Board could require a "showing of general relevance and reasonable scope of the evidence sought" (*id.* at 376 (footnote omitted)).

[11] Petitioner also contends (Pet. 17-18) that the Board should have enforced the subpoena because the "state statutory privilege * * * is * * * preempted by the [National Labor Relations Act]" (*id.* at 17). Petitioner did not raise this argument before either the Board or the court of appeals and thus has not preserved the issue for review. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 664 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the issue is not whether the Board could override the state

2. Petitioner also contends (Pet. 18-20) that the Board should have reduced the backpay of one discriminatee, Miles Fonseca, who disclosed his interim earnings to the Board, because he failed to report them to the Internal Revenue Service (IRS). Courts have approved the Board's consistent practice of declining to penalize discriminatees who fully report earnings to the Board, but fail to do so to other federal or state authorities. See *Hacienda Hotel*, 279 N.L.R.B. No. 84 (Apr. 28, 1986) (failure to report tips to IRS), enforced mem., 813 F.2d 1230 (9th Cir. 1987); *Louton, Inc.*, 281 N.L.R.B. No. 154 (Sept. 30, 1986) (same), enforced, 822 F.2d 412 (3d Cir. 1987); *Liberty Scrap Materials, Inc.*, 152 N.L.R.B. 480 (1965) (failure to report interim earnings to state unemployment agency), enforced, 64 L.R.R.M. (BNA) 2686 (6th Cir. 1967). Contrary to petitioner's assertion (Pet. 19), the Board's practice does not encourage tax evasion. The employee who conceals income from the IRS subjects himself to civil and criminal penalties. See 26 U.S.C. (& Supp. IV) 6601-6602, 7201-7207, 7601-7655.[12] Under the circumstances, the court of appeals correctly enforced the Board's decision.

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statute. Under its regulations, 29 C.F.R. 102.31(b), the Board exercises its discretion in each case to decide whether to respect a particular state confidentiality provision; the only issue is whether it reasonably exercised that discretion here.

[12] Petitioner's reliance (Pet. 20) on cases such as *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), and *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942), is misplaced. In those decisions this Court held that certain practices by the Board would improperly undermine enforcement of other federal statutes. Here, by awarding backpay to a discriminatee who failed to report income to the IRS, the Board in effect declined to impose an additional nontax penalty on the failure to report income. By this action, the Board did not either weaken or interfere with enforcement of the federal income tax statutes.

3. Finally, petitioner contends (Pet. 20-22) that, under *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982), an offer to reinstate unlawfully discharged employees to positions without accrued seniority tolls backpay. Petitioner has failed to preserve this issue for review by not raising it before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). Moreover, this issue is not presented by the record. The Board did not find that petitioner offered the striking employees reinstatement conditioned only on loss of seniority. Instead, the Board found that petitioner's offer was " 'ambiguous at best,' " that petitioner offered to rehire only two employees, and that petitioner had not reinstated those two employees to substantially equivalent positions (Pet. App. 19, 418 n.38).

In any event, *Ford Motor Co.* v. *EEOC*, *supra*, does not govern the situation presented. In that case, this Court held that, under Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), an employer's offer of employment, without retroactive seniority, to job applicants who were allegedly discriminated against in hiring, "ends the accrual of potential backpay liability" (458 U.S. at 241). The Court, in reaching this conclusion, expressed concern (*id.* at 240) that requiring the employer to grant fictional seniority to new employees who had not yet proven, and might never prove, unlawful discrimination would cause unwarranted layoffs and other harm to innocent employees. In contrast, the Board's order requiring the employer to reinstate unlawfully discharged employees to positions with accrued seniority, the case at hand, would frustrate no legitimate expectations of less senior employees. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 231 (1963) (unlawful to grant striker replacements and nonstriking employees superseniority over returning strikers).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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